Feb 27 1871
Mr Phillips ad
Mr Hanson 2

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~282~~ 90

A. LEVY, PLAINTIFF IN ERROR,

vs.

A. T. STEWART & COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

Off

FILED NOVEMBER 12, 1869.

March 4 1871

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1 United States circuit court.

A. T. STEWART & Co. } No. 5655.
vs.
A. LEVY.

Petition.—Filed July 27th, 1868.

To the hon. the circuit court of the United States for the fifth circuit and district of Louisiana, holding sessions in the city of New Orleans:

The petition of Alexander T. Stewart, Francis Warder, and William Libby, who reside in the city of New York, & there carry on commercial business under the firm of A. T. Stewart & Co., against A. Levy, who is a citizen of the State of Louisiana, residing in this district, respectfully represents—

That they are citizens of the State of New York.

That they are holders & owners of three promissory notes drawn in their favor by A. Levy & Co., of which firm the said A. Levy was a member, & bound in solido for the debts of said firm, it being a
2 commercial firm, all dated at New York, & payable in New Orleans; one dated August 6th, 1860, & due six months after date, for sixteen hundred & eighteen $\frac{55}{100}$ dollars; another, August 23d, 1860, & due six months after date, for fourteen hundred and fifteen $\frac{59}{100}$ dollars; the remaining one dated August 20th, 1860, due six months after date, for four hundred & forty-two $\frac{17}{100}$ dollars, all of which notes, at maturity, were duly presented for payment, which, being refused, were duly protested for non-payment; all of which facts more fully appear from reference to the said notes & protests thereof hereunto annexed.

Also, in addition to the above, that the said defendant is indebted to them for merchandize sold and delivered to the said firm of A. Levy & Co. on the 13th of April, 1863, for the sum of sixty-three $\frac{03}{100}$ dollars, with interest from that date.

By virtue of the premises, the said defendant is justly indebted to the plaintiffs for the amount of said notes, with interest from the dates of protest, and sixteen dollars costs of protest, and also the above account, all of which he neglects and refuses to pay, although of amicably demanded.

Wherefore petitioners pray that the said defendant be duly
3 cited, at his residence in Jackson, Louisiana, and that after all due proceedings had, he be condemned to pay them the amount of said notes & account, with interest as aforesaid, and costs of protest, and for all other relief in the premises, &c., &c.

(Signed) ELMORE & KING,
Att'ys for Pet'rs.

Original note annexed to protest, and filed July 27th, 1868.

$1,618\frac{55}{100}$. NEW YORK, *August 6th*, 1860.

Six months after date we promise to pay to the order of Alex'r T. Stewart & Co., with exchange, at office of Slachter, Smith & Shotwell, New Orleans, sixteen hundred and eighteen $\frac{55}{100}$ dollars, value received.

A. LEVY & CO.

Endorsed: Pay Merchants' Bank, or order.

A. T. STEWART & CO.,
P'r GEO. B. BUTLER, *Att'y.*

Pay A. Montreuil, esquire, cashier, or order.

I. D. VERMILYE, *Cas.*

REC. 282—1.

Protest.—Filed July 27th, 1868.

UNITED STATES OF AMERICA, *State of Louisiana:*

By this public instrument of protest be it known that on this
4 ninth day of February, in the year one thousand eight hundred and sixty-one, at the request of A Montreuil, esq'r., cashier of the Bank of Louisiana, holder of the original note, whereof a true copy is on the reverse hereof written, I, Felix Grima, notary public in and for the city and parish of New Orleans, duly commissioned and sworn, by my deputy, Ch's F. Barry, presented the said note to a clerk of Messrs. Slachter, Smith & Shotwell, at their office, where it is made payable, and demanded payment thereof, and was answered that no funds had been deposited there to pay said note.

Whereupon I, the said notary, at the request aforesaid, did protest, and by these presents do publicly and solemnly protest, as well against the drawer or the maker of the said note, as against all others whom it doth or may concern, for all exchange, re-exchange, damages, costs, charges, and interests suffered or to be suffered, for want of payment of the said note.

Thus done and protested in the presence of Charles F. Barry & Louis Dutour, both of this city, witnesses.

In testimony whereof I grant these presents, under my signa-
5 ture and the impress of my seal of office, at the city of New Orleans, on the day and year first above written.

[SEAL.] (Signed) F. GRIMA, *Not. Pub.*

$1,618\frac{55}{100}$. NEW YORK, *August 6th*, 1860.

Six months after date we promise to pay to the order of Alex'r T Stewart & Co., with exchange, at office of Slachter, Smith & Shotwell, New Orleans, sixteen hundred & eighteen $\frac{55}{100}$ dollars, value received.

A. LEVY & CO.

Endorsed: Pay Merchants' Bank, or order.

A. T. STEWART & CO.,
Per GEO. B. BUTLER, *Att'y.*

Pay A. Montreuil, esquire, cashier, or order.

I. D. VERMILYE, *Cas.*

I, the undersigned notary, do hereby certify that the parties to the original note, whereof a true copy is above written, have been duly notified of the protest thereof by letters to them by me written and addressed, dated on the day of the said protest thereof, and served on them respectively, in the manner following, viz:

By enclosing those for the drawers and endorsers in the one for I. D. Vermilye, cashier, directed to him at New York, which I deposited in the post office in this city on the same day as this protest, in time
6 to go by the first mail thereafter.

In faith whereof I have hereunto sign my name, together with Charles F. Barry and Louis Dutour, witnesses, at New Orleans, this 9th day of February, eighteen hundred and sixty-one.

(Signed) CH'S F. BARRY.
[SEAL.] (") F'X GRIMA, *Not. Pub.*

Original note annexed to protest, and filed July 27th, 1868.

$442 $\frac{17}{100}$. NEW YORK, *August* 20, 1860.

Six months after date we promise to pay to the order of Alex'r T. Stewart & Co., with exchange, at office of Slachter, Smith & Shotwell, New Orleans, four hundred and forty-two $\frac{17}{100}$ dollars, value received.

A. LEVY & CO.

(Endorsed:) Pay Merchants' Bank, or order.

A. T. STEWART & CO.,
P'r GEO. B. BUTLER.

Pay A. Montreuil, esq., cashier, or order.

I. D. VERMILYE, *Cas.*

Protest.—Filed July 27th, 1868.

STATE OF LOUISIANA:

By this public instrument of protest be it known that on this twenty-third day of February, in the year one thousand eight hundred
7 & sixty-one, at the request of A. Montreuil, esq., cashier of the Bank of Louisiana, holder of the original note, whereof a true copy is on the reverse hereof written, I, Felix Grima, notary public in and for the city & parish of New Orleans, duly commissioned & sworn, by my deputy, Charles F. Barry, presented the said note to a clerk of Mess. Slaughter, Smith & Shotwell, at their office in this city, where the said note is made payable, they, the said Slaughter, Smith & Shotwell, then not being in, and demanded payment of the same, and was answered that no funds had been deposited there to pay the said note.

Whereupon I, the said notary, at the request aforesaid, did protest, and by these presents do publicly & solemnly protest, as well against the drawer or maker of the said note as against all others whom it doth or may concern, for all exchange, re-exchange, damages, costs, charges, and interests, suffered or to be suffered, for want of payment of the said note.

Thus done and protested in the presence of Charles F. Barry & Louis Dutour, both of this city, witnesses.

8 In testimony whereof I grant these presents, under my signature and the impress of my seal of office, at the city of New Orleans, on the day and year first above written.

[SEAL.] (Signed) F'X GRIMA, *Not. Pub.*

$442 $\frac{17}{100}$. NEW YORK, *August* 20, 1860.

Six months after date we promise to pay to the order of Alex. T. Stewart & Co., with exchange, at office of Slachter, Smith & Shotwell, New Orleans, four hundred & forty-two $\frac{17}{100}$ dollars, value received.

A. LEVY & CO.

(Endorsed:) Pay Merchants' Bank, or order.

A. T. STEWART & CO.,
P'r. GEO. B. BUTLER.

Pay A. Montreuil, esq., cashier, or order.

I. D. VERMILY, *Cas.*

I, the undersigned notary, do hereby certify that the parties to the original note, whereof a true copy is above written, have been duly notified of the protest thereof by letters to them by me written and ad-

dressed, dated on the day of the said protest, and served on them respectively in the manner following, viz:

By enclosing those for the drawers & for the first endorsers in the one for I. D. Vermily, cashier, directed to him at New York, and a duplicate notice for the drawers, A. Levy & Co., directed to them at Baton Rouge, Louisiana, all which I deposited in the post office in this city on the same day of

9 In faith whereof I have hereunto sign my name, together with Charles F. Barry & Louis Dutour, witnesses, at New Orleans, this 23d of February, eighteen hundred and sixty-one.

(Signed) L. DUTOUR.
CH. F. BARRY.
F'X GRIMA, *Not. Pub.*

Original note annexed to protest and filed July 27th, 1868.

$1,415\frac{59}{100}$. NEW YORK, *August* 23, 1860.

Six months after date we promise to pay to the order of Alex'r T. Stewart & Co., with exchange, at office of Slachter, Smith & Shotwell, N. O., fourteen hundred and fifteen $\frac{59}{100}$ dollars, value received.

A. LEVY & CO.

(Endorsed:) Pay Merchants' Bank, or order.

A. T. STEWART & CO.,
P'r GEO. B. BUTLER, *Att'y.*

Pay A. Montreuil, esq., cashier, or order.

I. D. VERMILY, *Cas.*

Protest.—Filed July 27th, 1868.

STATE OF LOUISIANA:

By this public instrument of protest be it known that on this twenty-sixth day of February, in the year one thousand eight hundred and sixty-one, at the request of A. Montreuil, esq., cashier of the

10 Bank of Louisiana, holder of the original note, whereof a true copy is on the reverse hereof written, I, Felix Grima, notary public in and for the city and parish of New Orleans, duly commissioned and sworn, by my deputy, Chas. F. Barry, presented the said note to a clerk of Mess. Slaughter, Smith & Shotwell, at their office, where it is made payable, and demanded payment thereof, and was answered that no funds had been deposited with them to pay said note.

Whereupon I, the said notary, at the request aforesaid, did protest, and by these presents do publicly and solemnly protest, as well against the drawer or maker of the said note, as against all others whom it doth or may concern, for all exchange, re-exchange, damages, costs, charges, and interests suffered or to be suffered for want of payment of the said note.

Thus done and protested in the presence of Ch's F. Barry and Louis Dutour, both of this city, witnesses.

In testimony whereof I grant these presents, under my signature and the impress of my seal of office, at the city of New Orleans, on the day and year first above written.

[SEAL.] (Signed) F'X GRIMA, *Not. Pub.*

11 $1,415 59. NEW YORK, *August* 23, 1860.

Six months after date we promise to pay to the order of Alex'r T. Stewart & Co., with exchange, at office of Slachter, Smith & Shotwell, N. O., fourteen hundred & fifteen $\frac{59}{100}$ dollars, value received.

A. LEVY & CO.

(Endorsed:) Pay Merchants' Bank, or order.

A. T. STEWART & CO.,
P'r GEO. B. BUTLER, *Att'y.*

Pay A. Montreuil, esq., cashier, or order.

I. D. VERMILY, *Cas.*

I, the undersigned notary, do hereby certify that the parties to the original note, whereof a true copy is above written, have been duly notified of the protest thereof by letters to them by me written and addressed, dated on the day of the said protest, and served on them respectively, in the manner following, viz:

By enclosing those for the draw'rs and first endorsers in the one for I. D. Vermily, cash'r, directed to him at New York, and a duplicate notice to the drawers, directed to them at Baton Rouge, Louisiana, all which notices I deposited in the post office in this city on the same day of this protest

In faith whereof I have hereunto signed my name, together with
12 Ch's F. Barry and Louis Dutour, witnesses, at New Orleans, this twenty-sixth of February, eighteen hundred and sixty-one.

(Signed) L. DUTOUR.
CH'S F. BARRY.
F'X GRIMA, *Not. Pub.*

Citation to A. Levy.

The President of the United States of America to the marshal of the district of Louisiana, greeting:

A. T. STEWART & Co. } No. 5655.
vs.
A. LEVY. }

You are hereby commanded to summon A. Levy, individually, and as member of the firm of A. Levy & Co., and a citizen of the State of Louisiana, to comply with the demand of Alex. T. Stewart, Francis Warden, and William Libby, citizens of the State of New York, contained in the petition of which a copy accompanies this citation, or to deliver his answer to the same in the office of the clerk of the circuit court of the United States, fifth judicial circuit and district of Louisiana, in the city of New Orleans, in ten days after the service hereof, or judgment will be rendered against him by default, which de-
13 lay is increased one day for every ten miles the defendant's residence is distant from New Orleans, the place where the court is held. And that you make due return hereof on the first Monday of September, 1868.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at the city of New Orleans, this 27th day of July, A. D. one thousand eight hundred and sixty-eight, and of the independence of the United States of America the 93d year.

[SEAL.] (Signed) D. URBAN, *Clerk.*

Marshal's return on the above citation.

Received Jul. 28, 1868, by the U. S. marshal, and returned, not served for want of deposit.
New Orleans, Nov'r 9, 1868.
(Signed) I. I. PREIS,
D'y U. S. Marshal.

Alias citation to A. Levy.

The President of the United States of America to the marshal of the district of Louisiana, greeting:

A. T. STEWART & Co. *vs.* A. LEVY. } No. 5655.

14 You are hereby commanded, as you have heretofore been, to summon A. Levy, individually, and as member of the firm of A. Levy & Co., & a citizen of the State of Louisiana, to comply with the demand of A. T. Stewart & Co., citizens of the State of New York, contained in the petition of which a copy accompanies this alias citation, or to deliver his answer to the same in the office of the clerk of the circuit court of the United States, fifth judicial circuit and district of Louisiana, in the city of New Orleans, in ten days after the service hereof, or judgment will be rendererd against him by default, which delay is increased one day for every ten miles the defendant's residence is distant from New Orleans, the place where the court is held; and that you make due return hereof on the first Monday of December, 1868.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at the city of New Orleans, this 10th day of November, A. D. one thousand eight hundred & sixty-eight and of the independence of the United States of America the 93d year.

[SEAL.] (Signed) D. URBAN, *Clerk*,
By F. B. VINOT, *D'y Clk.*

15 *Marshal's return on the above citation.*

Received Nov. 10, 1868, by the U. S. marshal, & on the 7th day of Dec., 1868, served copy of within citation, plaintiff's petition accompanying same, on A. Levy, def't named herein, personally at U. S. marshal's office in the custom-house building in this city.
New Orleans, Dec. 7, 1868.
(Signed) H. I. SAMSON,
D'y U. S. Marshal.

Exceptions.—Filed Dec. 17, 1868.

Circuit court United States, fifth district of Louisiana.

A. T. STEWART & Co. *vs.* A. LEVY. } No. 5655.

Respondent, by his att'y, now comes into court and for exception to plaintiffs' petition says that the individual members composing said firm,

at the date the promissory notes sued upon, were Alexander T. Stewart, George Fox, and Francis Warder; that against said firm, composed of said individual members, he has a good and valid defence.

And for further exception respondent avers that it is not al-
16 leged that the present firm composed of the individual members in the said petition, ever acquired a legal and valid title to said notes sued upon; wherefore respondent prays that these exceptions be maintained and said suit be dismissed at plaintiffs' costs; and as in duty bound, &c.

(Signed) I. LIVINGSTON,
Att'y for Def't.

Motion to file supplemental petition.—Extract from the minutes November term, 1868.

NEW ORLEANS, *Tuesday, December*, 24, 1868.

Court met pursuant to adjournment. Present, Hon. E. H. Durell, dist. judge.

A. T. STEWART & Co. *vs.* A. LEVY. } No. 5655.

On motion of Elmore & King, of counsel for pl'ffs, & upon suggesting to the court that the defendant has filed an exception setting forth an error in setting forth the names of the firm of said plaintiffs, it is orderered that pl'ffs have leave to file a supplemental petition correcting the mistake, & that the exception be dismissed at pl'ffs' costs.

17 *Supplemental petition.—Filed Dec. 24th*, 1868.

United States circuit court for the fifth circuit, district of Louisiana.

A. T. STEWART & Co. *vs.* A. LEVY. } No. 5655.

After due permission obtained, the plaintiffs file this supplemental petition amending the original petition, in which they admit that in setting out the names composing plaintiffs' firm, they set forth William Libby as a member of the firm at the time the causes of action accrued. That this was done by mistake. Instead of William Libby, George Fox should have mentioned as a member of the said firm of plaintiffs.

Wherefore plaintiffs pray that the said defendant be cited to answer this supplemental petition, & the original petition as amended, & that plaintiffs have judgment as originally prayed for, &c., &c.

(Signed) ELMORE & KING,
Att'ys for Pl'ffs.

I accept service of this amended petition.
N. O., Dec. 24. 1868.
(Signed) I. LIVINGSTON,
Att'y for Def't.

18 *Answer.—Filed Jan'y* 9, 1869.

Circuit court United States, fifth circuit, district of Louisiana.

A. T. STEWART & Co. } No. 5655.
vs.
A. LEVY.

And now comes into court the defendant, by his attorney, and for answer denies all and singular the allegations in plaintiffs' petition contained.

And, for further answer, defendant pleads the prescription of three years to the account sued upon; and to the three promissory notes alleged in petition, all to be dated in August, 1860, and due & payable six months after date, defendant pleads the prescription of five years, as established by Articles 3505 & 3506 of the Civil Code, and by act of March, 1852, and prays to be hence dismissed, with all reasonable costs & charges; & as in duty bound, &c.

(Signed) I. LIVINGSTON,
Att'y for Def't.

Judgment.—Extract from the minutes of May 18*th*, 1869.

A. T. STEWART & Co. } No. 5655.
vs.
A. LEVY.

19 This cause was called for trial—Elmore & King, for plaintiffs; I. Livingston, for defendant—when, after hearing the pleadings, evidence, and counsel, the court having overruled the defendant's plea of prescription, it is ordered, adjudged, and decreed that the plaintiffs, A. T. Stewart & Co., do recover from the defendant, A. Levy, the sum of thirty-four hundred and seventy-six $\frac{31}{100}$ dollars, amount of the three notes sued on, with 5 % interest on $1,618 55 from 9th February, 1861; on $1,415 59, from 26 February, 1861; & on $442 17, from 23 February, 1861, till paid; $16 costs of protest, & costs of suit.

It is further ordered that plaintiffs' claim for $63 03 upon the account be dismissed; they having failed to prove the same.

Note of evidence.—Filed May 18, 1869.

Plaintiffs offered testimony of Mr. Haas, marked "A."
I. Livingston sworn.
Plaintiffs offered the three notes and protests.
W. W. King sworn.

20 Testimony of Mr. Haas, marked "A," offered in evidence by plaintiffs, and filed May 18th, 1869.

NEW ORLEANS, *May* 18*th*, 1869.

I have known Mr. A. Levy for a number years; Mr. Levy has resided here in the city for the last 4 or 5 years; during the war Mr. Levy, I think, resided in Bayou Sara or Jackson, La. I have seen Mr. Levy several times here during the war, staying here, at times, from 10 days to 21 days. Mr. Levy had always his agent here during the war to attend to his business; his agent name is L. C.

Michael. Mr. Levy doing business in Bayou Sara, & has done so for a number of years. This all I know about that case.

(Signed) LEON HAAS, JR.

I consent to this statement being received as evidence.

(Signed) I. LIVINGSTON,
Att'y for A. Levy.

Remittitur.—Extract from the minutes of May 20, 1869.

A. T. STEWART & Co. } No. 5655.
vs.
A. LEVY.

21 The plaintiffs in this case hereby remit all of the judgment entered in this case over the sum of twenty-five hundred & seventy-four $\frac{59}{100}$ dollars, with interest thereon from the 4th of February, 1861, except the costs.

Rule for a new trial.—Extract from the minutes of May 20, 1869.

A. T. STEWART & Co. } No. 5655.
vs.
A. LEVY.

On motion of I. Livingston, att'y for defendant herein, it is ordered by the court that the plaintiffs show cause on 25th inst., at 11 a. m., why a new trial should not be granted on the grounds filed.

Grounds.—Filed May 20th, 1869.

First. That prescription had been interrupted by the institution of suit No. 5587 by the present plaintiffs against the present defendant, when the record in this case proves that the defendant had not been cited to appear and answer.

Second. That the act of 1858 prohibits the introduction of parol proof to prove an acknowledgment of indebtedness after prescription has once been acquired.

22 Third. That the refusal or neglect of the plaintiffs' attorney to follow instructions, even if proved, and his discontinuance of suit No. 5587 without instructions, cannot avail the plaintiffs as against this defendant, & cannot interrupt prescription, the plaintiffs' remedy, if any they have, being against their attorney.

Fourth. That the 34th section of the judiciary act of 1789 provides that the Supreme Court of the United States shall be guided in its decisions upon questions arising under State laws by the construction which the highest court in the State puts upon the statutes of the State; that the supreme court of the State, in numerous cases, have decided that there can be no interruption of prescription under the laws of this State relative to the prescription of promissory notes & bills of exchange; that, under these decisions, the defendant had acquired a right by prescription long anterior to the institution of suit No. 5587.

Fifth. That there is error in allowing interest to run from the maturity of the notes sued upon in this case.

Marshal's return of service of the above rule

23 Received May 21, 1869, by the U. S. marshal, and on 24 day of

May, 1869, served copy of within rule on Elmore & King, att'ys named herein, by leaving same in hands of F. B. King, brother of member of firm, at office, cor. of Magazine and Natchez sts., in this city.

New Orleans, May 25, '69.

(Signed) A. FREDERICK,
Dep. U. S. Marshal.

Hearing & submission of rule.—Extract from the minutes of June 5th, 1869.

A. T. STEWART & Co. } No. 5655.
vs.
A. LEVY.

The rule taken by deft on 20 ult'o was called—I. Livingston for pl'ff in rule; Elmore & King for def'ts in rule—when, after hearing argument, the court took time to advise.

Order on rule.—Extract from the minutes of June 15th, 1869.

A. T. STEWART & Co. } No. 5655.
vs.
A. LEVY.

For reasons orally assigned, it is ordered that the judgment herein rendered on 18 May last be so amended as to decree that the
24 interest claimed be abated from the 16 of August, 1861, date of the President's proclamation of non-intercourse, to the 27th day of April, 1862, when the city of New Orleans was taken by the federal forces, the said defendant having then and thereafter an agent in said city.

It is further ordered that, thus amended, said judgment be reaffirmed, and a new trial refused, with costs.

Statement of facts.—Filed June 15, 1869.

United States circuit court for the fifth circuit, district of Louisiana.

A. T. STEWART & Co. } No. 5655.
vs.
A. LEVY.

The statement of facts in this case shall consist of the pleadings, the notes and documents offered in evidence, and the entries on the minutes of the proceedings in the case, and judgment of the court, together with the following statement of the evidence introduced:

It was in proof that the defendant resided in Bayou Sara, in the
25 parish of West Feliciana, or at Clinton, in the parish of East Feliciana, at the dates at which the notes sued on were given & matured, & that he continued to reside there during the war.

That he had an agent in New Orleans during the war, and made one or two visits to New Orleans towards the close of the war.

That the plaintiffs resided in the city of New York during the whole of the above-mentioned time.

That the plaintiffs brought suit on the same cause of action on the 4th day of March, 1868.

That the defendant made a compromise and settlement of the said suit with I. Livingston, esq., who had brought the suit as the attorney

at law of the plaintiffs; that in consequence of the said compromise and settlement the said Livingston discontinued the suit on the 8th of May, 1868.

That said Livingston had no authority from the plaintiffs to enter into the said compromise, or make said settlement, or discontinue said suit.

That the plaintiffs repudiated his acts in the case so soon as informed of them, & afterwards brought the present suit.

26 The United States circuit court was organized in New Orleans the 24th of June, 1863.

The notes sued on were payable in New Orleans.

Under the foregoing facts the court overruled the plea of prescription and gave judgment for the plaintiffs.

The practice of the court in Louisiana is that all cases are tried before the court, unless the plaintiff or defendant ask that the cause may be tried by a jury In this case neither party ask for a jury.

The counsel for the defendant excepted to the decision of the court, on the ground, first, that the bringing of the first suit May 4, 1868, did not interrupt prescription; and, second, that by the decisions of the supreme court of Louisiana, the highest court in the State, the civil war did not interrupt prescription, and that the courts of the United States are bound to follow the decisions of the supreme court of Louisiana upon the law of prescription of the State of Louisiana.

(Signed) I. LIVINGSTON,
Att'y for Def't.

No objection. E. & K.

(Signed) E. H. DURELL, *Judge.*

27 *Final judgment.—From judgment docket.*

United States circuit court, fifth circuit and district of Louisiana.—April term, 1869.

NEW ORLEANS, *Tuesday, May* 18, 1869.

Court met pursuant to adjournment. Present, Hon. E. H. Durell, dist. judge.

A. T. STEWART & Co.
vs.
A. LEVY. } No. 5655.

This cause was called for trial—Elmore & King for plaintiffs, I. Livingston for defendant—when, after hearing the pleadings, evidence, and counsel, the court having overruled the defendant's plea of prescription, it is ordered, adjudged, and decreed that the plaintiffs, A. T. Stewart & Co., do recover from the defendant, A. Levy, the sum of thirty-four hundred and seventy-six $\frac{31}{100}$ dollars, amount of the three notes sued on, with 5 % interest on $1,618 55 from 9th February, 1861; on $1,415 59 from 26th February, 1861, and on $442 17 from 23d February, 1861, till paid, $16 costs of protest, and costs of suit.

It is further ordered that the plaintiffs' claim for 63\frac{03}{100}$ upon
28 the account be dismissed, they having failed to prove the same.

SAME
vs.
SAME.

NEW ORLEANS, *Thursday, May* 20, 1869.

The plaintiffs in this case hereby remit all of the judgment entered in this case over the sum of twenty-five hundred and seventy-four $\frac{59}{100}$ dollars, with interest thereon from the 4th of February, 1861, except the costs.

NEW ORLEANS, *Tuesday, June* 15, 1869.

Court met pursuant to adjournment. Present, Hon. E. H. Durell, dist. judge.

A. T. STEWART & CO.
vs.
A. LEVY. } No. 5655.

For reasons orally assigned, it is ordered that the judgment herein rendered on 18th May last be so amended as to decree that the interest claimed be abated from the 16th August, 1861, date of the President's proclamation of non-intercourse, to the 27th day of April, 1862, when the city of New Orleans was taken by the federal forces, the said defendant having then and thereafter an agent in said city. It is further ordered that thus amended said judgment be reaffirmed, and a new trial refused, with costs.

Judgment rendered May 18th, 1869.
Judgment signed June 16th, 1869.

(Signed) E. H. DURELL, *Judge.*

29 *Petition for writ of error and order thereon.—Filed June* 21, 1869.

Circuit court U. States.

A. T. STEWART & CO.
vs.
A. LEVY. } No. 5655.

The petition of A. Levy, defendant in the above-entitled suit, respectfully represents that he is informed that there is error in the final judgment rendered on the 16th day of June instant, & he prays that a writ of error to reverse said judgment be granted to him, returnable in the Supreme Court of the United States on the first Monday of December, 1869, and upon giving bond & security in the sum of five thousand & seven hundred dollars, conditioned as the law directs, and that said writ of error shall operate as a supersedeas and stay execution until the final decree of the Sup. Court.

And petitioner prays that pl'ffs be cited to appear at the Supreme Court on the day of the return of this writ of error; and as in duty bound.

(Signed) I. LIVINGSTON,
Att'y for Def't.

Order.

A writ of error to operate as a supersedeas is allowed in this case
30 as prayed for, returnable to the Sup. Court of the U. S. the 1st

Monday of Dec'b'r next, the plaintiff in error giving bond in the sum of five thousand & seven hundred dollars, with good and solvent security, conditioned as the law directs.

June 21, 1869.

(Signed) E. H. DURELL, *Judge.*

Bond for writ of error.—Filed June 21. 1869.

Know all men by these presents that we, A. Levy, as principal, and A. Haas, jr., of New Orleans, as surety, are held and firmly bound unto A. T. Stewart & Co. in the full sum of five thousand and seven hundred dollars, to be paid to the said A. T. Stewart & Co., their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals and dated this 21st day of June, in the year of our Lord one thousand eight hundred and sixty-nine.

Whereas lately, at a circuit court of the United States, fifth
31 judicial circuit, holding sessions in and for the district of Louisiana, in a suit depending in said circuit court, wherein A. T. Stewart & Co. were plaintiffs, and A. Levy, defendant, judgment was rendered against A. Levy, defendant, & the said A. Levy, defendant, having obtained a writ of error and filed a copy thereof in the clerk's office of the said circuit court to reverse the judgment in the aforesaid suit, & a citation directed to the said A. T. Stewart & Co., citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington the first Monday of December next:

Now, the condition of the above obligation is such, that if the said A. Levy shall prosecute his writ to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) A. LEVY. [SEAL.]

(") LEON HAAS, JR. [L. S.]

Sealed and delivered in the presence of—

(Signed) BENJAMIN MOSS.

32 UNITED STATES OF AMERICA,

Circuit Court of the United States,

Fifth Circuit and District of Louisiana, Clerk's Office:

I, Dominick Urban, clerk of the circuit court of the United States for fifth circuit and district of Louisiania, do hereby certify that the foregoing 31 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had, together with all the evidence adduced on the trial of the case of A. T. Stewart & Co. vs. A. Levy, No. 5655 of the docket, so far as the same now remain of record or on file in said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 27th day of August, A. D. 1869.

[SEAL.] D. URBAN, *Clerk.*

[Five-cent internal revenue stamp, canceled.]

I, Edward H. Durell, United States judge for the district of Louisiana, do hereby certify that Dominick Urban, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and district of Louisiana, was, at the time of signing

said certificate, and is now, the clerk of said court; that said certificate is in due form of law; and that full faith and credit are due to his official attestations as such clerk.

Given under my hand and seal at the city of New Orleans, in said district, this 27th day of August, A. D. 1869.

E. H. DURELL, *Judge.*

[Five-cent internal revenue stamp, canceled.]

33 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States in and for the fifth circuit, and holding sessions for the district of Louisiana, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or one of you, between A. T. Stewart & Co. and A. Levy, a manifest error hath happened, to the great damage of the said A. Levy, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this 21st of June, in the year of our Lord one thousand eight hundred and sixty-nine.

[SEAL.] D. URBAN,
Clerk of the United States Circuit Court for District of Louisiana.

34 (Indorsed:) United States circuit court. No. 5655. A. T. Stewart & Co. vs. A. Levy. Writ of error.

Filed June 21, 1869.

F. B. VINOT, *D'y Clk.*

35 THE UNITED STATES OF AMERICA,
District of Louisiana:

The President of the United States to A. T. Stewart & Co., greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and district of Louisiana, wherein A. Levy is plaintiff in error, and you are defendants, to show cause, if any there be, why the judgment rendered against the said A. Levy, as in said writ mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this 22d day of June, in the year of our Lord one thousand eight hundred and sixty-nine.

E. H. DURELL, *Judge.*

36 (Indorsed:) United States circuit court. No. 5655. A. Levy, pl'ff in error, vs. A. T. Stewart & Co. Citation.

Marshal's return.

Received Jun. 28, 1869, by the U. S. marshal, and on the same day, month, and year served a copy hereof on W. W. King, att'y for A. T. Stewart & Co., by delivering the same to him in person, cor. Magazine & Natchez streets, in this city.

New Orleans, June 29, '69.

S. W. REED, *D'y Marshal.*

(Indorsement on cover:) No. 282. A. Levy, plaintiff in error, vs. A. T. Stewart & Company. Louisiana C. C. U. S.

Filed 12th November, 1869.

Supreme Court United States,

A. Levy
vs.
A. T. Stewart & Co., } No. 90.

BRIEF OF P. PHILLIPS.

The note sued on is dated 6th August, 1860, and payable at the office of Kachler, Smith and Shortwell, in the city of New Orleans, six months after the date thereof, to wit, the 6th February, 1861.

The present suit was commenced in the Circuit Court United States on 27th July, 1868, to which the plea of prescription of five years was interposed under articles 3505, 3506, Civil Code.

This plea was overruled and judgment rendered for plaintiffs below on an agreed statement of facts:

1. That the defendant resided at Bayou Sara and Clinton during the war and at the time the notes matured, and during this time had an agent residing in the city of New Orleans.

2. That the plaintiffs resided in New York, during this period.

3. That a suit was commenced on the note 4th March, 1868, and discontinued by plaintiff's attorney 8th May, 1868.

4. That the attorney was not authorized by the plaintiffs to discontinue the suit, and that they repudiated his

act as soon as known, and afterwards brought the present suit.

5. That the Circuit Court United States was organized in New Orleans 24th June, 1863.

The suit commenced the 8th May, 1868, and which was discontinued, can have no effect upon the plea, for the code expressly provides, Article 3485, that when a plaintiff, "after making his demand, abandons or *discontinues* it, the interruption shall be considered as having never happened."

If the parties had desired to insist on the want of authority to discontinue the suit they should have applied to the Court to set aside the discontinuance, and reinstate the cause.

Nor was the prescription interrupted by the statement that the defendant "had entered into a compromise and settlement of said suit."

A party has the right to purchase his peace, and an offer to pay a certain sum if the suit is dismissed, is by no means to be construed as a specific acknowledgment of the justice of the demand.

In May, 1868, more than seven years had elapsed from the maturity of the notes. If the prescription was then complete, then in order to *renew the obligation*, the acknowledgment must be of a *particular specific debt*, and be specifically proven.

Courtebray v. Rils, 9 Rob., 513.
Buard v. Leuicé, 12 Rob. 251.

The agreement to compromise is not such an acknowledgment, as to amount to a *new promise* to pay the specific debt.

Tyson v. McGill, 15 Loui., 145.
Succession of Jewell, 11 An., 83.

Independant of this, the statute of the State requires that to be binding the promise must be in writing when the prescription has already run.

See act of 1858, p. 148.

The question then is, what effect was produced by the war on the law of prescription, when the suit is brought in Louisiana on a contract payable in Louisiana?

Prescription is governed by the law of the Forum—in other words the law of the State in which the suit is brought.

When we therefore ascertain what that law is, it governs all judicial proceedings, whether the same are instituted in the State Courts or the Courts of the United States administering justice in that State.

A citizen of another State sueing a citizen of Louisiana on a Louisiana contract can have no cause to complain if the law applicable to the limitation of his right to sue is the same as is applied to suits between her own citizens.

The 34th section of the judiciary enforces this principle by declaring that the laws of the several States shall be regarded as rules of decisions, in trials at common law in the courts in the United States.

Now by the code of Louisiana, bills and notes are prescribed by five years reckoning from their maturity.

This prescription is peculiar—for it runs against *minors* and *interdicted persons*, and also against persons residing out of the State.

Art. 3505, 3506.

There is a marked distinction between this and the Stat. of 21, Iac. 1, which specially saves the rights of such persons.

Now it is to be noted that if the duration of war pre

vented in law the institution of a suit, it would by no means follow that the party was entitled to the full term of five years after the war ended.

The city of New Orleans was taken possession of by the Federal forces 6 May, 1862. The Circuit Court of the United States was reorganized in Louisiana in June, 1863, the war practically terminated in April, 1865, and the present suit was commenced on 27 July, 1868.

If the decisions of the Supreme Court of Louisiana have settled indisputably that by the true construction of their code the parties were bound to sue when the war terminated, and were not entitled to five years from that event, then we maintain the Circuit Court and this Court are bound by this decision.

A fixed and received construction by a State in its own courts makes a part of the statute law, and must therefore be considered as final by the Supreme Court.

Shelby v. Gay, 11 Wheat., 361.

Green v. Neal, 6 Pet., 298.

From the earliest period this Court has always considered that in construing the statutes of the State infinite mischief would ensue should the Federal Courts observe a different rule from that which has been established in a State.

McKeen v. Delaney's Lessee, 5 Cr., 22.

Counting five years from the maturity of the notes, brings us to February, 1866. From the close of the war to this latter period there were still nine months in which the parties could have brought their suit. This they did not avail themselvesof, but took their first action three years after the termination of the war.

We say that for the *purpose of a suit* the war terminated in May, 1865.

Thus the act of 1863 suspended the "habeas corpus" *during the rebellion.* When the writ is applied for, the fact to be ascertained is, whether the Rebellion has ended, and this is ascertained as any other fact in the case.

The writ was issued in 1865, and the petitioner discharged.

Ex parte Martin, 45 Barb., 153.

So the act of 12 March, 1863, directs the supervisory agent to receive all property captured *during the war.* It was decided by the Chief Justice that "actual hostilities practically terminated in May, 1865," and that the act then ceased to be operative.

McLeod v. Callicott.

So under the non-intercourse act of 13 July, 1861, all intercourse is declared to be unlawful "*as long as such condition of hostility should continue.*" It was held by Judge Trigg that a shipment of cotton on 25 May, 1865, was unaffected by the act.

(Decatur Cotton Case.)

By proclamation of the 29 April, 1865, (13 stat. 776,) all restrictions upon commercial intercourse with so much of the State of Louisiana as lies east of the Mississippi River, and were within the lines of military occupation were removed. Bayou Sara and Clinton, the residence of the defendant were at that date within the lines, and they lie to the East of the river.

By another proclamation of 10 May, 1865, (p. 757) it is declared that armed resistance to the authority of the Government in the insurrectionary States may be regarded as virtually at an end.

As the District Court of the United States was reorganized in New Orleans in 1863, there was no impediment in the way of the plaintiff, and he may have brought his suit

at any time from that period to February, 1856, before the prescription of five years would have expired.

Was he bound by the law of Louisiana to act within this time?

In Rabel v. Pourcian, February term, 1868, the Supreme Court of Louisiana say—On 30th January, 1866, the prescription on the note would have expired, but of this time there were two years, during which judicial action was suspended in the Parish where defendant resided, and we are now to determine whether the plaintiff, having failed to sue within five years, although there was no impediment during the *last six months* of the legal delay, his action subsequently instituted is not prescribed.

After a full discussion and a learned argument by a former Chief Justice on a motion for rehearing, the court decided that the maxim "*contra non valentem agere non curret prescriptio*" could not be invoked to relieve the note from the effect of prescription. That the maxim has no application to the prescription of bills and notes when suit might have been brought before prescription obtained.

20 Loui. An., 131.

This decision was reaffirmed in

Durben v. Spiller, Ib. 219.
Payne & Harrison v. Douglass, Ib. 280.
Durand v. Heinn, Ib. 345.
Marcy v. Steele, Ib. 413.
Norwood v. Mills, Ib. 422.

In this last case the court say: "The courts (State) were open from July, 1865, and with ordinary diligence he might have brought his suit between that time and the 24th April, 1866, the period at which the five years would have elapsed."

Lemon v. West, Loui. An., 427.

Walls v. Bradley, Ib. 523.
Schlenker v. Taliafero, Ib. 565.

These decisions are founded on the authority of eminent civilians who have commented on the Code Napoleon, from which the Louisiana Code is derived.

Troplong on this subject quotes a decree of the Court of Cassation, 1st August, 1829, to the effect that war does not suspend prescription when the creditor had the means of exacting his debt in another place than that declared in a state of blockade.

He then says as a logical consequence, if the impediment proceeding from war or pestilence occurs in an intermediate time, (*temps intermediare*,) and not a time bordering on the expiration of the prescription, it ought not to be taken into account, since when the creditor is free to act he has all the time that is necessary to compel his debtor to pay—for where would be from that time the "*force majuere*," which alone authorise the suspension of prescription? By way of illustration, he says: "I reside in a city which is blockaded for the period of one year, and twenty years remain to avoid the thirty years prescription of my right: would it not be ridiculous to attempt a justification of negligence in not acting during this period and demanding that this period of siege should not be counted as part of the thirty years? What '*force majeure*' has paralyzed me, since for twenty years I could at any moment have avoided this impediment? We must pay strict attention," says he, to the fact that a hindrance founded on war is not written in the law, that it is never legalized but by an act of '*force majeure*,' shown to the satisfaction of the judge, and that he should never admit it but when sustained by an irreparable and invincible obstacle.

"When the creditor has had sufficient time (*temps utile*) to redress himself, '*force majeure*' is a vain allegation, and the time thus lost, so easy to repair, just as the time of an

apoplexy, or fever, or grief. The time of prescription is in fine regulated by law, with sufficient latitude and favor, so that is not necessary that each (every) day should be '*absolument utiles.*'"

Troplong—*Droit Civile Explique De la Prescription*, 2, p. 258.

THE ACT OF 1864,

13 *Stat.*, *p.* 123.

This act provides that whenever during the existence of the rebellion, any action, *civil or criminal* shall accrue *against* any person, or whenever after such action, *civil or criminal* shall have accrued, such person cannot by reason of resistance to the laws, or the interruption or judicial proceedings be *arrested*, or served with process, the time during which he shall be beyond the reach of legal process shall not be taken as "any part of the time *limited by law* for the commencement of such action."

It is to be observed in the construction of this act that there is no expression as to the class in *whose favor*, the law is to operate. It tells us plainly *against* whom it is levelled.

The actions described are not only civil, but *criminal*. It speaks not only of "service of process," but "*arrest*."

Finally it declares that the impediment described shall not be taken "as any part of the time limited by *law*."

We submit that in the use, of the term "by law" as well as in the provision for *arrest* in *criminal proceedings*, the cases provided for in this act are limited to those only in which the United States, is the party complaining or prosecuting.

The bill was originally introduced, into the Senate by Mr. Wilson, by which it was proposed to "repeal all statutes and laws limiting the time within which the proceedings in criminal or civil courts, or courts martial, may

be had so far as they relate to acts done, or crimes or misdemeanors committed since 1 January, 1860, and to repeal all provisions of any statute or laws which limit the time for any proceedings relating to abandonment confiscation or forfeiture of real or personal property."

This bill was reported on by the Judiciary Committee striking out all after the enacting clause, and inserting the present provisions. Thus amended, the bill was passed without any debate.

Globe, Part 1, 1863–4, p. 670.

In the House, the bill of the Senate was passed without any debate.

Globe, Part 3, p. 2773.

This legislative history is confirmatory of the view taken, that the object of the act was to guard the rights of the United States, alone.

To hold that Congress intended to apply this law to actions or indictments when a citizen or a state was the party complaining or prosecuting would be in derogation of the rules for interpreting statutes.

Legislation prima facie is limited to that which is within the ordinary jurisdiction of the legislating body. It is within the territory subject to the legislating body, that it can enforce its enactments; it is within that territory that it is interested in what the law, should be. Santos vs. Illege, 8 Scott's, C. B. (N. S.) 869.

In another case it is said that "the general run of laws enacted by the superior state are supposed to be calculated for its own internal Government, and do not extend to distant dependent countries, which bearing no part in the legislation are not therefore in its ordinary, and bearing daily contemplation. But when the sovereign legislative power sees it, necessary to extend its care, to any of its, subordinate dominions and mentions them expressly by

name, or includes them under general words, there can be no doubt that then they are bound by its laws."

Att'y Gen'l Stewart, 2 Meriv 143.

Without discussing the question whether Congress has the power, to pass a statute of limitations affecting contracts between individuals in the several states, it is sufficient to say, they have never attempted the exercise of such a power. A statute of this kind which should govern Federal courts it is evident would be destructive of that harmony and equality which should exist in the courts of a state in the administration of justice. To adopt a construction which would lead to such results, would require language so express as to leave no room for the principles of interpretation.

In the case of Hanger v. Abbott, this act was pressed upon the attention of the court as a full and sufficient answer to the plea of the statute of limitations, but the court declared that it was not necessary to decide it, and refused to express any opinion on the subject.

6 Wall., 542.

This very emphatic reservation of the Court induces the belief that it has anticipated me in foreseeing the difficulties which would result from denying the construction which is now confidently submitted to be the true one.

P. PHILLIPS,
For Appellant.

In the Supreme Court of the United States.

A. LEVY, plaintiff in error,
vs.
A. T. STEWART & Co.

In error to the Circuit Court of the United States for the District of Louisiana.

BRIEF OF DEFENDANTS IN ERROR.

This case, as presented in the record, shows simply that the plaintiffs, in the court below, commenced suit against the defendant on certain promissory notes, and that, being brought into court, the defendant pleaded prescription of five years, under the civil code of Louisiana.

It is necessary to a proper understanding of the proceedings, so far, that it be stated, that under what is known as the Code of Practice of Louisiana, the plaintiffs were not permitted to enter a replication to the defendants' answer invoking the statute of prescription.

Article 329 of that code declares that:

"When the defendant in his answer alleges on his part new facts, these shall be considered as denied by the plaintiff; therefore, neither replication nor rejoinder shall be admitted."

This rule of practice has been repeatedly held in Louisiana to bar all replications; so, of course, what was embraced in the defendants' answer was open to every "objection of law and fact, the same as if specially pleaded." (13 Annual Rep., 412; 3 La. Rep., 392; 12 Rob. La. Rep., 648; 11 La. Rep., 553; 8 Martin's New Series, 141.)

The plaintiffs are presumed simply to have denied the validity of the statute of prescription, which the defendants had invoked, and thus spread upon the record in bar of their

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The plaintiffs are presumed simply to have denied the validity of the statute of prescription, which the defendants had invoked, and thus spread upon the record in bar of their

recovery. They declared that statute to have been suspended by the late civil war, which, in respect to the entire territorial limits of Louisiana, had made the plaintiffs alien enemies, and which confessedly had made the defendants citizens of a State which had, by force of arms, undertaken to maintain a government, not only independent of the United States, but in open contempt of their civil and military authority.

When the case came up for hearing the Circuit Court overruled the defendants plea of prescription and gave judgment for the plaintiffs.

The defendant then moved for a new trial on special grounds, which are set forth in the record, (page 9.)

The court, being thus advised, amended its judgment, and refused a new trial with costs.

On the 15th of June, 1869, the attorneys of the plaintiffs and defendants filed what is called "a statement of facts," which seems to have been indorsed by the judge. This "statement" is another way of settling a bill of exceptions, and is presumed to have all the weight and judicial sanctions of a bill of exceptions. It is made a part of the regular proceedings in the court below, and is understood to have been a full statement of all the facts elicited on the trial, including all entries on the minutes of the proceedings in court, together with a statement of the law of the case insisted upon and enforced by the defendant.

Then, whatever error is alleged to have been committed by the Circuit Court we are to find in this *statement of facts.* That is the agreement of both parties with reference to the statement.

By this "*statement*" we find—

I. That the defendant resided, when the notes were given and matured, in the parish of West Feliciana or Clinton, Louisiana, and continued to reside there during the war. That he had an agent in New Orleans during the war, and made one or two visits to New Orleans *towards the close of the war.*

II. That the plaintiffs resided in the city of New York during the whole of the above-mentioned time.

III. That the plaintiffs brought suit, on the same cause of action, on the 4th day of March, 1868. That the defendant made a compromise and settlement of said suit with I. Livingston, Esq., who had brought the suit as the attorney-at-law of the plaintiffs; that in consequence of said compromise and settlement Livingston discontinued the suit on the 8th of May, 1868.

That Livingston had no authority from plaintiffs to enter into the said compromise or discontinue said suit, and that the plaintiffs repudiated his acts as soon as informed of them, and afterwards brought the present suit.

IV. That the Circuit Court of the United States was organized in New Orleans the 24th of June, 1863.

V. That the notes sued on were payable in New Orleans.

VI. That under the foregoing facts the court overruled the defendant's plea of prescription, and gave judgment for the plaintiffs.

VII. That the counsel for the defendant excepted to the decision of the court, on the grounds: (1.) That the bringing of the first suit, May 4, 1868, did not interrupt prescription, and, (2,) because the Supreme Court of Louisiana, the highest court in the State, had decided that the civil war did not interrupt prescription, and that the courts of the United States *are bound to follow the decisions of the Supreme Court of Louisiana upon the law of prescription of the State of Louisiana.* (Record, pp. 10, 11.)

This "statement," we take it for granted, embodies all the errors which the defendant in the court below seeks to correct by the transfer of the case to this court.

It is thus seen that *two* points are made by the plaintiff in error:

(1.) That the suit commenced in May, 1868, and discontinued, did not interrupt prescription; and

(2.) That the Supreme Court of Louisiana had decided that the civil war, the non-intercourse proclamation of the President, nor the act of Congress of the 11th of June, 1864, nor

any other act of Congress, did interrupt prescription; that prescription has never been interrupted; and "that the courts of the United States are bound to follow the Supreme Court of Louisiana upon the law of prescription of the State of Louisiana."

The First Point.

It is of little consequence, as we view the case, what disposition is made of this point. The defendant, in the court below, filed what is called by the record (see p. 9) "grounds" of defense; and a view of those grounds makes it possible that he relied upon the operation of prescription for the period of five years, from the 24th of June, 1863, to the 24th of the same month in 1868, which last date is prior to the commencement of said suit. The first suit was commenced May 4, 1868, and of course did not allow the required five years, starting from the 24th of June, 1863.

A careful review of the "statement," discloses the fact of the residence of the defendant in the court below, at a place inside of what was known as the confederate lines; at a place over which, from the beginning to the end of the recent war, the jurisdiction and authority of the constitution and laws of the United States were excluded by arms and acts of war. It also appears by the statement that the plaintiff in error was a citizen of the then government of Louisiana; a government which utterly defied the constitutional authority of the United States; within whose jurisdiction, *including the residence of the defendant* in the court below, no process of this court, civil or criminal, could have been or was ever recognized or served. It also appears by the statement that the plaintiffs resided in the State of New York.

Proclamation of blockade was made by the President on the 19th of April, 1861. On the 13th of July, 1861, Congress passed a law authorizing the President to interdict all trade and intercourse between the inhabitants of the States in insurrection and the rest of the United States, (12 Stats. at Large, 1258–1259.

War is a prohibition against all commercial intercouse, (5 Wallace, p. 489.) This rule is rigid (6 Wallace, 532.)

In respect to this point, Lord Coke says, "When the courts of justice are open and judges and ministers of the same may by law protect men from wrongs and violence and distribute justice to all, it is said to be time of peace; but where, by invasion, rebellion, or such like, the peaceable course of justice is disturbed and stopped, so as the courts of justice be, as it were, shut up, *et silent leges inter arma*, then it is said to be time of war."

The President of the United States, independent of authority conferred upon him by law, had power to use any means or agencies to suppress rebellion in Louisiana.

The Constitution is a compact of government, as well as an instrument conveying authority to the executive, legislative, and judicial departments. It is the arch of the political system, a self-sustaining structure. It imposes upon the President, who is the keystone of the arch, an obligation, enforced by his oath,—the only oath prescribed in the compact of government,—"to preserve, protect, and defend" it. It is this power, thus delegated to the Executive, which clothes him with all the means and gives him the command of all the agencies of the State for self-preservation and vindication.

This power is paramount to every other power, whether delegated or reserved. The nature of the great political trust, thus directly imposed upon the President with such emphasis and solemnity, cannot be misunderstood. To preserve, protect, and defend, signifies the employment of force against force, and, as a necessary consequence, to interdict, as in war, all intercourse between a rebellious State and the United States.

The act of the 13th of July, 1861, was cumulative, so far as it conferred authority upon the President to command non-intercourse. The proclamation of the 16th August, 1861, then absolutely not only shut up the courts of Louisiana, but made the people of Louisiana alien enemies. It established non-intercourse, and in respect to the United States, carried with it all the rights and incidents of war, so

far as that State was concerned, without conferring upon the latter any rights whatever. It is, perhaps, the right of a belligerent State, in time of war, to confiscate the debts due from its citizens to citizens of the other belligerent Power. But no such right existed in the rebellious State of Louisiana. The simple effect of the war was to shut up the courts and to suspend the operation of its laws.

So, in this case, the statutes of limitations, referred to in the 34th section of the judiciary act of 1789, were absolutely suspended. (6 Wall., p. 532.)

It matters little, in this view of what is disclosed in the statement, whether suit was commenced in May, 1868, or July of the same year. But the plaintiffs in the court below did institute suit, by the defendant's own admission, on the 4th of May, 1868, on the same cause of action; nor does it appear by any act of theirs that that suit was discontinued.

It is proper to observe that Louisiana was long under the dominion of Spain, and in her Civil Code has adopted the Roman law. Properly speaking she has no Statute of Limitation, but has adopted in its stead the Law of Prescription, which differs from the American and English laws in this: that while those statutes only bar the remedy, without extinguishing the right, the law of prescription of Louisiana, as of Spain, bars both remedy and right.

Prescription is a manner of acquiring property or of discharging debts by the effect of time. (Civil Code, Art. 3420.)

It would seem but just, in view of this peculiar process of discharging debts, that the suit commenced in May, 1868, should be held to interrupt the operation of the law. Prescription, by which property is acquired, demands on the part of the possessor perfect good faith; and so we insist there must be good faith in him who seeks to discharge a debt by the effect of time. The residence of the defendant, beyond the reach of judicial process, and his political *status* as a citizen of a State at war with the United States, make it impossible that he can be accounted to have acted in that good faith which is necessary to enable him to demand the discharge of his obligations to the plaintiffs.

The Second Point.

Whether the Circuit Court of the United States was "bound to follow the Supreme Court of Louisiana upon the Law of Prescription of the State of Louisiana," is certainly a grave question under the peculiar circumstances of this case.

By the act of the 5th of February, 1867, (14 Statutes at Large, p. 385,) power is given to this court in certain cases to re-examine, reverse, or affirm the final judgments of the highest courts of any State; and it is expressly provided that whenever the highest court of any State shall affirm "the validity of a statute of, or an authority exercised under, any State," which are "repugnant to the Constitution, treaties, or laws of the United States," this court may re-examine, reverse, or affirm such judgment.

It would be anomalous, indeed, with the powers of re-examination and judgment conferred upon this court to reverse at discretion, on specified grounds, the judgments of the State courts, to refuse the exercise of judicial authority over the decisions of the latter, on the ground that this court, in the language of the *statement of facts, is bound to follow such decisions.*

What the defendant in the court below understood by this judicial rule of action we find disclosed in the record at page 9, in what he calls his *grounds* of defense.

The 34th section of the judiciary act of 1789 (Statutes at Large, p. 85) is referred to, and it is claimed that the Supreme Court of the United States is bound to follow the rules of construction of the State courts upon questions arising under State laws; and that the court of Louisiana, having affirmed the validity of the statute of prescription of that State, this court will hold the Circuit Court in this case to have erred in overruling prescription, as invoked by the defendant in the court below. The statement explicitly declares that "the courts of the United States are bound to follow

the decisions of the Supreme Court of Louisiana *upon the law of prescription of the State of Louisiana.*

This is broad enough to cover this case, as well as every other possible case arising out of the enforcement of the law of prescription. Whether the Circuit Court decided that prescription had been suspended a given length of time, or any time, or for any reason arising out of the facts elicited on trial, or any other state of facts, whether in the conflict of statutory laws it had been repealed or not, does not appear. The court overruled prescription, and the defendant set up in his exception to the decision, that the court was bound to follow the decisions of the State Court of Louisiana, which had affirmed the validity of the law, or, as we find it more positively expressed in the "grounds," (Record, p. 9,) "decided that there can be no interruption of prescription under the laws of this (Louisiana) State relative to the prescription of promissory notes and bills of exchange."

This is certainly comprehensive enough, and the exception of the defendant in the court below gives the reason why there can be no interruption, viz, that the courts of the United States are bound to follow the decision of the State court, which had previously declared that "there can be no such interruption." It follows that the decisions of the Circuit Court would have been legal and proper, had the question of prescription *not* been submitted to the State court, and so, of course, a case coming here on writ of error, involving that question, would have been affirmed. But the next case coming here, the State court meanwhile having declared that "there can be no interruption of prescription," this court would find itself instructed by the State court to reverse its former decision.

The question presented here in no practical sense involves the *construction* of the law of prescription, but it is whether that law was a valid law during the war; whether the acts of the State and the United States did not operate, *ipso facto*, to suspend the law during the war. The defendants in error here insist that by virtue of the decision of this court in the case reported in the 6 Wallace, p. 532, they have a right

to claim that prescription was so suspended; and for the same reason, that the act of the 11th of June, 1864, did not of itself originate or validate any right of the plaintiffs in the court below, which had not accrued to them by the ordination of non-intercourse by the President and Congress.

It is not material to inquire into the conduct of Louisiana in 1861. She assumed a hostile attitude towards the Government of the United States, expelled their ministerial and judicial officers, denied the binding force of the Constitution, and forbade and prohibited the execution of their laws within her territorial jurisdiction. These acts were followed by the proclamations of the President declaring and ordaining non-intercourse.

From the day of the publication of those proclamations to the restoration of peace, there was no such State as Louisiana, and no such law as the statute of prescription of that State.

Inter arma silent leges is the rule which applied to the State from 1861 to 1865. The statute of prescription pleaded by the defendant in the court below was inoperative as against the plaintiffs, who resided in New York when the notes matured and during the whole period of the war. (16 Johns. Reports, 213; Wheaton, 541, 546; 1 Kent, 67, 68; 6 Wallace, 532.)

This court maintains, as I understand their decision, that the act of secession of the State of Louisiana was a simple usurpation of power and void, and that the practical withdrawal of the State from the Government of the Constitution did not invalidate the authority of its Supreme Court over persons within its jurisdiction. This may be admitted, without conferring upon that court authority to determine the validity of a law in respect to a citizen of the United States residing in another State, who, by the laws of the United States, was forbidden to hold any sort of intercourse with the defendant in the court below, from 1861 to 1865. With respect to the plaintiffs' proceedings in the Circuit Court, involving their rights as creditors, the law of prescription, invoked by the defendant, was clearly repugnant to the

Constitution and laws of the United States. So the court held. Undoubtedly, as in the Rhode Island Dorr case, where there are two parties claiming the right to exercise the powers of government, and the supreme court of the State has decided that one of them is in the exercise of legitimate authority and the other in the exercise of usurped authority, this court might properly hold that they were bound to follow the decision of the State court upon the question of legitimacy. And so it might, with some semblance of reason, be maintained, that in respect to citizens of the same State, involving the execution of a law of the State, this court should follow the decision of the State court.

Mr. Justice Swayne, speaking of adverse decisions of the State courts, and the power and duties of this court, in respect to cases arising under the 25th section of the judiciary act of 1789, says:

"There are several adjudications of the highest court of the State more or less adverse to the views we have expressed. We do not deem it necessary more particularly to advert to them. Entertaining the highest respect for those by whom they were made, we have yet been unable to concur in the conclusions which they announce. It is alike the duty of that court and of this to decide the question involved in this class of cases as in all others when presented for decision. This duty carries with it investigation, reflection, and the exercise of judgment. *It cannot be performed on our part by blindly following in the footsteps of others, and substituting their judgment for our own.*

"Were we to accept such a solution, we should abdicate the performance of a solemn duty, betray a sacred trust committed to our charge, and defeat the wise and provident policy of the Constitution, which called this court into existence.

"In all the cases brought here under the 25th section of the judiciary act, this court has never hesitated to determine for itself the construction and *effect* of any statute of a State brought here under review, without *reference to the previous adjudications of the highest court of the State upon the subject.*" (Butz *vs.* City of Muscatine, 8 Wallace, p. 575.)

S. M. Johnson,
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20 Lam

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2 Philem - translation

21 Lam - 30 - 45

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6 Pet — 248

13 Stat Lam 123

6 Mall 275

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2 Apn L 1863